

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JORGE GRANADOS,

Plaintiff,

v.

ANDERSEN, et al.,

Defendants.

No. C 15-04628 HRL (PR)

**ORDER OF PARTIAL DISMISSAL
AND OF SERVICE**

Plaintiff, a state prisoner at Pelican Bay State Prison ("PBSP"), filed the instant pro se civil rights action pursuant to 42 U.S.C. § 1983, against PBSP officials.

Plaintiff's motion for leave to proceed in forma pauperis, (Docket No. 2), shall be granted in a separate order.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state

1 a claim upon which relief may be granted or seek monetary relief from a defendant who
2 is immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must,
3 however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696,
4 699 (9th Cir. 1988).

5 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
6 elements: (1) that a right secured by the Constitution or laws of the United States was
7 violated, and (2) that the alleged violation was committed by a person acting under the
8 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

9 **B. Plaintiff's Claims**

10 Plaintiff claims that on January 18, 2014, Defendant Andersen wrongfully
11 opened Plaintiff's mail outside of his presence and confiscated a set of books titled,
12 "Black & Grey Tattoo 1-3: From Street Art to Fine Art," worth several hundreds of
13 dollars, which Plaintiff ordered through Amazon, an online vendor. (Compl. Attach. at
14 6.) The purported reason for the confiscation was that the books were on the
15 Centralized List of Disapproved Publications, revised January 2014. (Id.) Plaintiff was
16 given the option of either mailing the books to family, donating them, or destroying
17 them. (Id.) When Plaintiff stated that he wanted to return the books to the vendor for a
18 refund pursuant to the vendor's return policy, Defendant Andersen told him that was not
19 an option. (Id. at 7.) Thereafter, Plaintiff filed inmate requests for interview, appeals,
20 and grievances pursuing an adequate remedy for the loss of his property, but without
21 success due to the actions of Defendants. (Id. at 7-19.)

22 Plaintiff claims that Defendants Ducart and Captain Parry violated his right to be
23 free from cruel and unusual punishment guaranteed by the Eighth Amendment "by their
24 failure to adequately supervise and train their subordinates." (Compl. Attach. at 20, ¶
25 1.) The Eighth Amendment imposes duties on prison officials who must provide all
26 prisoners with the basic necessities of life such as food, clothing, shelter, sanitation,
27 medical care, and personal safety. See Farmer v. Brennan, 511 U.S. 825, 832 (1994). It
28 cannot be said that art books constitute such a basic necessity under the Eighth

1 Amendment, such that their confiscation constitutes “cruel and unusual punishment.”
2 Accordingly, this claim is DISMISSED for failure to state a claim.

3 Plaintiff claims that Defendants Anderson, Davis, Enos, Bramucci, Stauffert, and
4 Townsend impeded his “fundamental right to file grievances; report misconduct; and to
5 have the allegations formally investigated.” (Compl. Attach. at 20, ¶ 2.) However,
6 there is no constitutional right to a prison administrative appeal or grievance system.
7 See Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003); Mann v. Adams, 855 F.2d
8 639, 640 (9th Cir. 1988); see also Antonelli v. Sheahan, 81 F.3d 1422, 1430 (7th Cir.
9 1996); Garfield v. Davis, 566 F. Supp. 1069, 1074 (E.D. Pa. 1983); accord Wolff v.
10 McDonnell, 418 U.S. 539, 565 (1974) (accepting Nebraska system wherein no
11 provision made for administrative review of disciplinary decisions). Furthermore, a
12 prison official’s failure to process grievances, without more, accordingly is not
13 actionable under § 1983. See Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993); see
14 also Ramirez, 334 F.3d at 860 (holding that prisoner’s claimed loss of a liberty interest
15 in the processing of his appeals does not violate due process because prisoners lack a
16 separate constitutional entitlement to a specific prison grievance system). Accordingly,
17 this claim is DISMISSED for failure to state a claim.

18 Plaintiff claims that Defendant Andersen violated his rights under the Eighth
19 Amendment when he opened, removed, and tampered with his mail without Plaintiff’s
20 knowledge and outside of his presence, and that he did so “sadistically and
21 maliciously.” (Compl. Attach. at 20, ¶ 3.) However, there is no case law to support the
22 notion that tampering with a prisoner’s mail amounts to “cruel and unusual punishment”
23 under the Eighth Amendment. Rather, a prisoner’s right to send and receive mail is
24 protected by the First Amendment. See Witherow v. Paff, 52 F.3d 264, 265 (9th Cir.
25 1995) (citing Thornburgh v. Abbott, 490 U.S. 401, 407 (1989)). Accordingly, this
26 claim is DISMISSED for failure to state a claim under the Eighth Amendment.
27 However, the Court will liberally construe this claim as one made under the First
28 Amendment. Id.

1 Plaintiff's claim that Defendants Andersen, Davis, Enos, Stauffert, Bramucci,
2 and Townsend violated his right to due process in the deprivation of his property,
3 (Compl. at 20-21, ¶ 4), which was neither random or unauthorized, is cognizable. See
4 Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 (1978). Whether due
5 process includes the right to an "unbiased fact-finder," (id. at ¶ 5), shall also be
6 included in this claim.

7 Plaintiff's claim that Defendants violated his right to equal protection, (Compl. at
8 21, ¶ 5), is DISMISSED for failure to state a claim as Plaintiff fails to identify the class
9 of "similarly situated persons" to which he belongs, see Furnace v. Sullivan, 705 F.3d
10 1021, 1030-31 (9th Cir. 2013), or describe how Defendants' treatment of him was
11 "invidiously dissimilar" to that received by the other members of the class, see More v.
12 Farrier, 984 F.2d 269, 271-72 (8th Cir. 1993).

13 Plaintiff claims that Defendants violated his Eighth Amendment right to be free
14 from cruel and unusual punishment by their "actions of retaliation." (Compl. at 21, ¶ 6.)
15 Although retaliation by a state actor for the exercise of a constitutional right is
16 actionable under § 1983, the claim for prisoners is grounded in the First Amendment not
17 the Eighth Amendment. "Within the prison context, a viable claim of First Amendment
18 retaliation entails five basic elements: (1) An assertion that a state actor took some
19 adverse action against an inmate (2) because of (3) that prisoner's protected conduct,
20 and that such action (4) chilled the inmate's exercise of his First Amendment rights, and
21 (5) the action did not reasonably advance a legitimate correctional goal." Rhodes v.
22 Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted). Accord Pratt v.
23 Rowland, 65 F.3d 802, 806 (9th Cir. 1995) (prisoner suing prison officials under § 1983
24 for retaliation must allege that he was retaliated against for exercising his constitutional
25 rights and that the retaliatory action did not advance legitimate penological goals, such
26 as preserving institutional order and discipline). Here, there is no allegation that
27 Defendants' actions "chilled" Plaintiff in the exercise of his First Amendment rights.
28 Rather, the allegations show that Plaintiff diligently and persistently pursued

1 administrative grievances despite the repeated rejections and cancellations.

2 Accordingly, this claim is DISMISSED for failure to state a claim.

3 Lastly, Plaintiff claims that Defendants violated his right to due process under
4 the Fourteenth Amendment. (Compl. at 22, ¶ 7.) The Due Process Clause of the
5 Fourteenth Amendment confers both procedural and substantive rights. See
6 Armendariz v. Penman, 75 F.3d 1311, 1318 (9th Cir. 1996) (en banc). Substantive due
7 process refers to certain actions that the government may not engage in, no matter how
8 many procedural safeguards it employs. See County of Sacramento v. Lewis, 523 U.S.
9 833, 847 (1998). “Only official conduct that ‘shocks the conscience’ is cognizable as a
10 due process violation.” Porter v. Osborn, 952 F.3d 1131, 1137 (9th Cir. 2008) (quoting
11 Lewis, 523 U.S. at 846). Such conduct may include a State’s interference with personal
12 decisions relating to marriage, procreation, contraception, family relationships, child
13 rearing, and education, as well as with an individual’s bodily integrity. See Armendariz
14 II, 75 F.3d at 1319. None of these interests are implicated by Plaintiff’s claim involving
15 art books, and the alleged conduct by Defendants, even if true, does not “shock the
16 conscience” to implicate the Fourteenth Amendment. See Porter, 952 F.3d at 1137.
17 Accordingly, this claim is DISMISSED for failure to state a claim.

18 This case will proceed only on the First Amendment and Due Process claims
19 discussed above. All other claims are DISMISSED for failure to state a claim.

20 CONCLUSION

21 For the reasons stated above, the Court orders as follows:

22 1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for
23 Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a
24 copy of the complaint, all attachments thereto, and a copy of this order upon
25 **Defendants Sgt. B. Davis, Sgt. E. Enos, Sgt. Stauffert, and Correctional Officers**
26
27
28

1 **Andersen¹, N. Bramucci, and M. Townsend at Pelican Bay State Prison, (P.O. Box**
 2 **7500, Crescent City, CA 95532). The Clerk shall also mail a copy of this Order to**
 3 **Plaintiff.**

4 The claims against Defendants C. Ducart and C. Parry have been dismissed. See
 5 supra at 2-3. Furthermore, Plaintiff sets forth no specific claims against Defendants T.
 6 Wood, B. Patton, and Graves. Accordingly, these Defendants are DISMISSED from
 7 this action. The Clerk shall terminate them from the docket.

8 2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil
 9 Procedure requires them to cooperate in saving unnecessary costs of service of the
 10 summons and the complaint. Pursuant to Rule 4, if Defendants, after being notified of
 11 this action and asked by the Court, on behalf of Plaintiff, to waive service of the
 12 summons, fail to do so, they will be required to bear the cost of such service unless
 13 good cause shown for their failure to sign and return the waiver form. If service is
 14 waived, this action will proceed as if Defendants had been served on the date that the
 15 waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be
 16 required to serve and file an answer before **sixty (60) days** from the day on which the
 17 request for waiver was sent. (This allows a longer time to respond than would be
 18 required if formal service of summons is necessary.) Defendants are asked to read the
 19 statement set forth at the foot of the waiver form that more completely describes the
 20 duties of the parties with regard to waiver of service of the summons. If service is
 21 waived after the date provided in the Notice but before Defendants have been personally
 22 served, the Answer shall be due **sixty (60) days** from the date on which the request for
 23 waiver was sent or **twenty (20) days** from the date the waiver form is filed, whichever
 24 is later.

25 3. No later than **ninety (90) days** from the date of this order, Defendants

26
 27 ¹ The Litigation Coordinator is requested to identify this individual based on
 28 the information contained in this order, i.e., that Defendant Andersen was the
 individual who examined and confiscated the books at issue on January 18, 2014.
See supra at 2.

1 shall file a motion for summary judgment or other dispositive motion with respect to the
2 claims in the complaint found to be cognizable above.

3 a. Any motion for summary judgment shall be supported by adequate
4 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules
5 of Civil Procedure. Defendants are advised that summary judgment cannot be granted,
6 nor qualified immunity found, if material facts are in dispute. If any Defendant is of the
7 opinion that this case cannot be resolved by summary judgment, he shall so inform the
8 Court prior to the date the summary judgment motion is due.

9 b. **In the event Defendants file a motion for summary judgment,**
10 **the Ninth Circuit has held that Plaintiff must be concurrently provided the**
11 **appropriate warnings under Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998)**
12 **(en banc). See Woods v. Carey, 684 F.3d 934, 940 (9th Cir. 2012).**

13 4. Plaintiff's opposition to the dispositive motion shall be filed with the
14 Court and served on Defendants no later than **twenty-eight (28) days** from the date
15 Defendants' motion is filed.

16 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure
17 and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary
18 judgment must come forward with evidence showing triable issues of material fact on
19 every essential element of his claim). Plaintiff is cautioned that failure to file an
20 opposition to Defendants' motion for summary judgment may be deemed to be a
21 consent by Plaintiff to the granting of the motion, and granting of judgment against
22 Plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per
23 curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

24 5. Defendants shall file a reply brief no later than **fourteen (14) days** after
25 Plaintiff's opposition is filed.

26 6. The motion shall be deemed submitted as of the date the reply brief is due.
27 No hearing will be held on the motion unless the Court so orders at a later date.

28 7. All communications by the Plaintiff with the Court must be served on

1 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
2 copy of the document to Defendants or Defendants' counsel.

3 8. Discovery may be taken in accordance with the Federal Rules of Civil
4 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or
5 Local Rule 16-1 is required before the parties may conduct discovery.

6 9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep
7 the court informed of any change of address and must comply with the court's orders in
8 a timely fashion. Failure to do so may result in the dismissal of this action for failure to
9 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

10 10. Extensions of time must be filed no later than the deadline sought to be
11 extended and must be accompanied by a showing of good cause.

12 **IT IS SO ORDERED.**

13
14 DATED: 1/29/16

15 
16 HOWARD R. LLOYD
17 United States Magistrate Judge
18
19
20
21
22
23
24
25
26
27
28